

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

Herkimer Forest Products Corporation,

Debtor.

Chapter 13
Case No. 04-13978

Herkimer Forest Products Corporation,

Plaintiff,

- against -

Adv. Pro. No. 04-90148

County of Clinton,

Defendant.

Appearances:

Pasquariello & Weiskopf, LLP
Attorneys for Herkimer Forest Products Corporation
One Marcus Boulevard
Suite 200
Albany, NY 12205

Richard H. Weiskopf, Esq.

Maynard, O'Connor, Smith & Catalinotto
Attorneys for County of Clinton
6 Tower Place
Albany, NY 12203

Robert A. Rausch, Esq.

Michael C. Lynch, Esq.
Albany County Attorney
Amicus Curiae
112 State Street, Suite 900
Albany, NY 12207

Tonia L. Summers, Esq.
Assistant County Attorney

Hon. Robert E. Littlefield, Jr., United States Bankruptcy Court Judge

Memorandum-Decision & Order

Herkimer Forest Products Corporation (the "Debtor") commenced this adversary

proceeding to set aside the conveyance of certain real property to the County of Clinton (the “County”) for nonpayment of taxes on the grounds that the County’s in rem foreclosure constituted a fraudulent transfer under § 548 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”). Currently before the court are competing motions for summary judgment.

Jurisdiction

The court has jurisdiction over this case pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), and 1334(b). This is a core matter pursuant to 28 U.S.C. § 157(b)(2)(H).

Facts

The relevant facts are not in dispute. The Debtor filed a voluntary petition for relief under chapter 11 of the Code, together with related schedules and statements, on June 16, 2004 (the “Petition”) (Doc. No. 1). The Debtor’s schedules reflect that it owns real estate in the Towns of Altona and Dannemora (collectively the “Properties”) valued at \$125,000 and \$250,000, respectively. (*Id.*, Schedule A.) The Properties are unimproved. The property in Altona consists of 597.20 acres, and the property in Dannemora consists of 728.80 acres. The Debtor scheduled the County as a creditor holding a priority claim in the amount of \$23,533.49 for unpaid pre-petition real property taxes. (*Id.*, Schedule E.) The total amount owed by the Debtor to unsecured creditors is \$202,146.85. (*Id.*, Schedule F.)

Prior to the commencement of the bankruptcy case, the County initiated an in rem foreclosure proceeding pursuant to Article 11 of New York Real Property Tax Law (“NYRPTL”) against the Debtor in connection with delinquent real property taxes owed for the

Properties (the“Foreclosure”).¹ The Clinton County Treasurer filed a List of Delinquent Taxes and Combined Notice & Petition of Foreclosure in the Clinton County Clerk’s Office. (July 20, 2003 Aff. of Robert Rausch, Esq.,² Ex. A.) The Debtor’s name was included in the Petition. (*Id.*) In October 2003, the County sent the Notice & Petition of Foreclosure via certified mail to the delinquent taxpayers, including the Debtor.³ (*Id.*, Ex. B.) The delinquent taxpayers were provided with notice that the Foreclosure had been commenced, the last date of redemption was January 16, 2004, and that in the event of their timely failure to redeem, they would be foreclosed of all rights they might have in their respective parcels. (*Id.*, Ex. A.)

The Debtor failed to pay its delinquent taxes prior to the redemption date. As a result, a Judgment of Foreclosure, dated February 16, 2004, was entered transferring title to the Properties to the County pursuant to § 1136(3) of NYRPTL.⁴ (*Id.*, Ex. C.) The Properties have

¹New York’s in rem tax foreclosure procedures are codified in Article 11 of New York Real Property Tax Law, “Procedures for Enforcement of Collection of Delinquent Taxes,” §§ 1100-1184.

² Being that the adversary proceeding was commenced in 2004, the court assumes the notary statement contains a typographical error and that the affidavit was sworn to on July 20, 2004, and not 2003.

³Although the County’s mailing was returned “unclaimed,” the Debtor does not argue lack of notice of the Foreclosure.

⁴New York Real Property Tax Law § 1136(3) provides that when a taxpayer fails to interpose an answer to the foreclosure petition:

The court shall make a final judgment awarding to such tax district the possession of any parcel of real property described in the petition of foreclosure.... In addition...such judgment shall contain a direction to the enforcing officer of the tax district to prepare, execute and cause to be recorded a deed conveying to such tax district full and complete title to the parcel. Upon the execution of such deed, the tax district shall be seized of an estate in fee simple absolute in such parcel and all persons...who may have had any right, title, interest, claim, lien or equity of redemption in...such parcel shall be barred and forever foreclosed of all such right....

not yet been offered for sale at public auction. It is undisputed that the Foreclosure complied with all requirements of state law. In total, the Debtor owed the County the sum of \$24,075.60 as of July 20, 2004 for delinquent taxes. (*Id.* ¶ 19.) According to the County's 2004 tax bills, the appraised values of the Properties are \$101,200 and \$168,600, respectively. (*Id.*, Ex. E.)

The Debtor commenced this adversary proceeding on or about June 16, 2004. The County filed an answer on or about July 8, 2004. A hearing on the competing motions for summary judgment was held on July 29, 2004 and continued until August 5, 2004, after which the court allowed the parties an opportunity to file further submissions. On September 3, 2004, the County filed its Brief in Support of Cross Motion. On September 9, 2004, the Debtor filed a letter submission in response. An *Amicus Curiae* brief was filed on September 13, 2004, by the County of Albany in support of the County's cross-motion.

Arguments

The Debtor's complaint alleges that the County's foreclosure of its tax liens constitutes an avoidable transfer under Code § 548 because the Debtor received less than reasonably equivalent value in exchange for the transfer of the Properties to the County. Relying on this court's earlier decision, *In re Harris*, No. 01-10365, slip op. (Bankr. N.D.N.Y. Mar. 11, 2003), the Debtor has requested that the court enter an order avoiding the transfer. The Debtor further contends that if the Properties are returned to the Debtor the harm to the County will be minimal as the County will receive the taxes that are due through the bankruptcy process.

The County denies that the Foreclosure constitutes a fraudulent transfer. First, the County contends that the Foreclosure was conducted in compliance with the statutory

(NYRPTL § 1136(3) (McKinney's 2000)).

requirements of Article 11 of NYRPTL. Second, the County contends that there is no suggestion that the County took the Properties with an “intent to hinder, delay, or defraud any other party.” (County’s Br. at 2.) The County notes that the Debtor’s right of redemption expired January 16, 2004, and the Debtor defaulted in the Foreclosure and failed to move to reopen the default within one month of entry of the Judgment of Foreclosure. As a result of the foregoing, the County argues the Debtor lacks any basis to bring the adversary proceeding to have the Properties returned as it lacks any actual remaining interest in the Properties.

The County acknowledges the court’s *Harris* decision, but requests that the court reconsider its holding and extend the reasoning of *BPF v. Resolution Trust Company*, 511 U.S. 531 (1994) (“BFP”), to in rem tax foreclosures. More specifically, the County argues that there should be a presumption that the value a debtor receives for the transfer of property in the context of an in rem tax foreclosure constitutes reasonably equivalent value. The County further relies upon *Comis v. County of Oneida*, 181 B.R. 145 (Bankr. N.D.N.Y. 1994), in support of its argument that the holding of *BFP* should be extended to in rem tax foreclosures. Based upon the foregoing, the County argues that where there has been specific compliance with the requirements of NYRPTL, an in rem tax foreclosure should not be set aside as fraudulent.

The County concedes that an in rem foreclosure conducted under NYRPTL does not provide for a public sale with competitive bidding in the first instance. The County indicates, however, that once a property is statutorily transferred to it pursuant to NYRPTL § 1136(3), it is mandated to offer it for sale at public auction.

The County suggests that if the court were to set aside the Foreclosure, the Code would essentially be used as a means to displace traditionally state regulated foreclosure proceedings,

an inherent state interest. Furthermore, the County argues acceptance of the Debtor's position would deter counties from foreclosing on properties to the detriment of their constituents if the sales could later be subject to scrutiny as fraudulent conveyances under the Code.

The County of Albany in its *Amicus Curiae* brief supports the County's arguments. Albany County stresses the level of additional burden that would be placed on each county in the state if the court were to find that their in rem foreclosure sales conducted pursuant to New York law could be construed as fraudulent transfers in the context of a bankruptcy proceeding.

Discussion

Summary judgment is appropriate where there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). For purposes of the pending motions, the court finds that there are no questions of fact. The legal question presented in this case is whether a transfer of property in connection with an in rem foreclosure proceeding conducted pursuant to Article 11 of NYRPTL may be avoided as a fraudulent transfer under Code § 548.

To establish a fraudulent conveyance under Code § 548, the following elements must be established: (1) the debtor had an interest in the property; (2) a transfer of that interest occurred within one year of the filing of the bankruptcy petition; (3) the debtor was insolvent at the time of the transfer or became insolvent as a result thereof; and (4) the debtor received "less than a reasonably equivalent value in exchange for such transfer." 11 U.S.C. § 548(a)(1)(B)(i), (ii)(I). The issue in this case centers around the last of these four elements: whether the Debtor received reasonably equivalent value for the Properties transferred to the County through the

Foreclosure.⁵ In *BFP*, the Supreme Court rejected the argument that a mortgage foreclosure sale constituted a fraudulent transfer concluding that the fact the property is taken in foreclosure necessarily redefines its value, and that the “reasonably equivalent value” of a foreclosed property for Code § 548 purposes is not the “fair market” value of property, but rather, “the price in fact received at the foreclosure sale, so long as all the requirements of the State’s foreclosure law have been complied with.” *BFP*, 511 U.S. at 545. The Court, however, expressly limited its holding to mortgage foreclosure sales stating “[t]he considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different.” *Id.* at 537 n.3.

In *Harris*, this court addressed whether the reasoning of *BFP* applies to in rem foreclosure sales conducted pursuant to NYRPTL. *In re Harris*, No. 01-10365. While the court noted the general trend of courts to extend the rationale of *BFP* beyond mortgage foreclosure procedures,⁶ the court recognized that the in rem foreclosure process under New York law is substantially different from other types of foreclosures in that there is no allowance for public sale and competitive bidding, (*id.* at 10-11), safeguards present in the context of the mortgage

⁵The arguments of the parties suggest that they have agreed the sole issue for the court to decide is whether the Debtor received “reasonably equivalent value.” If the other requirements of Code § 548(a)(1)(B)(ii)(I) are at issue, the parties have not made the court aware of them.

⁶*See In re Talbot*, 254 B.R. 63 (Bankr. D. Conn. 2000) (judgment in strict mortgage foreclosure context in accordance with Connecticut law conclusively established reasonably equivalent value); *see also In re McGrath*, 170 B.R. 78 (Bankr. D.N.J. 1994) (purchase price received at tax foreclosure sale conducted under New Jersey law was reasonably equivalent value for debtor’s interest in property). *But see In re Chase*, 2005 WL 189711 (Bankr. D.Vt. 2005) (compliance with Vermont strict mortgage foreclosure process does not create presumption of reasonably equivalent value); *In re Fitzgerald*, 255 B.R. 807 (Bankr. D. Conn. 2000) (strict mortgage foreclosure under Connecticut law was not determinative that mortgagee had given reasonably equivalent value for the property).

foreclosure process in *BFP*. For this reason, the court viewed the holding of *BFP* as inapplicable to in rem tax foreclosures. *Id.* at 11. Rather, the court adopted the rationale of *Wentworth v. Town of Acton, Maine (In re Wentworth)*, 221 B.R. 316 (Bankr. D. Conn. 1998), for the proposition that taxing authorities are not entitled to a conclusive presumption that they provided reasonably equivalent value when they take title to a debtor's real property pre-petition as a result of an in rem foreclosure due to unpaid taxes, even if all the requirements of NYRPTL are complied with. *Id.* The basis for the decision in *Harris* was the finding that in the absence of a public sale and competitive bidding, the "amount of a tax lien is no evidence whatsoever of the property's value" and, thus, there could be no presumption that the debtor received reasonably equivalent value. *Id.* at 11 (citing *In re Wentworth*, 221 B.R. at 320 (citation omitted)).

While the County admits there is no provision for a public sale and competitive bidding in an in rem tax foreclosure, the County references the fact that once a property is transferred to it under NYRPTL 1136(3), it is mandated to offer it for sale at public auction. At that point in time, however, the County is the fee owner of the property and any value the County receives at auction would be to its benefit not the debtor's.

The County cites *Comis v. County of Oneida*, 181 B.R. 145, in support of its argument that the rationale of *BFP* should be extended to foreclosure sales in New York. (County's Br. at 3–4). *Comis*, however, was decided under Article 10 of NYRPTL, which has since been repealed.⁷

The County has asked that the court not follow *Harris*, but the court declines the request.

⁷See L. 1993, c. 602, § 4, eff. Jan. 1, 1995. Former Article 10 of NYRPTL, §§ 1000-1098, provided for the county treasurer to conduct tax sales of properties on which taxes had become delinquent subject to a period of redemption.

After carefully considering the facts of this case and the rationale in *Harris*, the court concludes that there is nothing to distinguish this decision from the one arrived at in *Harris*. Thus, the court must determine whether the total amount of taxes due the County constituted reasonably equivalent value for the Properties for the purposes of Code § 548(a)(1)(B)(i). The tax debt owing to the County is approximately \$24,0000 and it is undisputed that the combined values of the Properties is at least \$269,800. The value of the Properties is approximately 11 times the debt. Clearly, the value of the Properties is not proportional to the Debtor's tax debt, and the transfer is voidable as fraudulent under Code § 548.

The provisions of NYRPTL are not rendered invalid by this decision.⁸ The rights of the County are not being displaced, but rather "impinged." *See In re Wentworth*, 221 B.R. at 240. The prejudice to the County by the return of the Properties to the Debtor will be minimal as the County will recover the full amount of its tax lien when the Properties are liquidated through the bankruptcy. In addition, other creditors will benefit from the liquidation of the Properties.

Conclusion

For all of the above reasons, the Debtor's motion for summary judgment is granted and the County shall reconvey the Properties to the Debtor. The County's cross motion for summary

⁸The argument that an in rem tax foreclosure sale conducted pursuant to NYRPTL constitutes a fraudulent transfer under Code § 548 would only be viable when the tax debt is significantly less than the value of the property transferred within one year of a bankruptcy filing. Whether the transfer is in fact avoidable would have to be determined on a case by case basis.

judgment is denied.

It is so ORDERED.

Dated: July 26, 2005

/s/ Robert E. Littlefield, Jr. _____
Honorable Robert E. Littlefield, Jr.
United States Bankruptcy Judge